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Before the
Federal Communication Commission
Washington, D.C. 20554

In re	§	
	§	
Joseph Frank Ptak	§	CIB Docket No. 98-44
San Marcos, Texas	§	
	§	
Order to Show Cause Why a	§	
Cease and Desist Order Should Not Be Issued	§	

IN THE MATTER OF AN ORDER TO SHOW CAUSE AND NOTICE OF OPPORTUNITY FOR HEARING

MOTION TO DISMISS SHOW CAUSE HEARING AND ANY INDICTMENT: UNCONSTITUTIONALITY OF §301

On This Day Of May 10, 1998

COMES NOW BEFORE THE COMMISSION :
Joe Ptak, Jeffrey "Zeal " Stefanoff and the Hays County Guardian et.al, who are the founders and controllers of the radio station known as μKind Radio San Marcos currently acting in propria persona , pursuant to Rule 12, F.R.Cr.P., and does hereby move this Honorable Hearing for an order dismissing the this cause hearing on the grounds that the statute upon which this prosecution is based, 47 U.S.C., §301(a), is unconstitutional. As grounds herefor,Joe Ptak, Jeffrey "Zeal " Stefanoff and the Hays County Guardian et.al, shows as follows:

1. Each count of the cause for the hearing that Joe Ptak, Jeffrey "Zeal " Stefanoff and the Hays County Guardian et.al, violated 47 U.S.C., §301 by making radio transmissions on the various dates specified therein "from a place in Texas to another place in Texas," and thus the allegations of the cause issues make it plain that it seeks to make penal acts occurring within **intrastate** commerce, i.e., that specifically occurring wholly within Texas;

2. The issue of this hearing is clearly based upon subsection (a) of §301 which

proscribes radio transmissions "from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession or District " without first having obtained a license from the Federal Communications Commission;

3. Section 301(a) is unconstitutional in that it attempts to regulate activity and make penal that which is beyond the foreign and interstate commerce powers of Congress granted to it via Art. 1, §8, cl. 3 of the United States Constitution.

4. Further proof is provided in the encolsed letters from the FCC explaining that the jurisdiction of the FCC is only between states and not intrastate (Letters enclosed, #1 , #2,#3).

5. It is further shown in item #1, #2, that the Great State of Texas regulates our **Intrastate** use of this frequncy(105.9 fm) through the issuance of State Press News Service Pass.

Wherefore, the premises considered, Joe Ptak, Jeffrey "Zeal" Stefanoff and the Hays County Guardian et.al, moves this Court to dismiss the indictment in this cause for hearing and dismiss this hearing for the reason that §301 is unconstitutional. In support hereof, the following brief is offered.

Respectfully submitted this the 12 day of May, 1998.

Joe Ptak, Jeffrey "Zeal " Stefanoff and
the Hays County Guardian et.al,
P.O. Box 305
San Marcos, Tx 78667

Before the
Federal Communication Commission
Washington, D.C. 20554

In re	§	
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Joseph Frank Ptak	§	CIB Docket No. 98-44
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Order to Show Cause Why a	§	
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IN THE MATTER OF AN ORDER TO SHOW CAUSE AND NOTICE OF OPPORTUNITY FOR HEARING

BRIEF IN SUPPORT OF MOTION TO DISMISS: UNCONSTITUTIONALITY OF §301

On This Day Of May 10, 1998

COMES NOW BEFORE THE COMMISSION :

Joe Ptak, Jeffrey "Zeal " Stefanoff and the Hays County Guardian et.al, who are the founders and controllers of the radio station known as μKind Radio San Marcos currently acting in propria persona , pursuant to Rule 12, F.R.Cr.P., and does hereby move this Honorable Hearing for an order dismissing the indictment in this cause hearing and dismiss this hearing on the grounds that the statutory foundation for it, 47 U.S.C., §301(a), unconstitutionally encompasses intrastate commerce. This brief supports that motion.

A. Congressional Interstate Commerce Powers.

The police power is vested in the states and not the federal government; see *Wilkerson v. Rahrer*, 140 U.S. 545, 554, 11 S.Ct. 865, 866 (1891) (the police power "is a power originally and always belonging to the states, not surrendered to them by the general government, nor directly restrained by the constitution of the United States, and essentially exclusive"); *Union National Bank v. Brown*, 101 Ky. 354, 41 S.W. 273 (1897); *John Woods & Sons v. Carl*, 75 Ark. 328, 87 S.W. 621, 623 (1905); *Southern*

Express Co. v. Whittle, 194 Ala. 406, 69 So.2d 652, 655 (1915); *Shealey v. Southern Ry. Co.*, 127 S.C. 15, 120 S.E. 561, 562 (1924) ("The police power under the American constitutional system has been left to the states. It has always belonged to them and was not surrendered by them to the general government, nor directly restrained by the constitution of the United States... Congress has no general power to enact police regulations operative within the territorial limits of a state"); and *McInerney v. Ervin*, 46 So.2d 458, 463 (Fla. 1950). Further, there are no common law offenses against the United States; see *United States v.Hudson*, 7 Cranch (11 U.S.) 32 (1813); *United States v. Coolidge*, 1 Wheat. (14 U.S.) 415 (1816); *United States v. Britton*, 108 U.S. 199, 206, 2 S.Ct. 531, 535 (1883); *Manchester v. Massachusetts*, 139 U.S. 240, 262–63, 11 S.Ct. 559, 564 (1891); *United States v. Eaton*, 144 U.S. 677, 687, 12 S.Ct. 764, 767 (1892); and *United States v. Flores*, 289 U.S. 137, 151, 53 S.Ct. 580, 582 (1933). But within the territories and insular possessions, Congress has the power of a state legislature; see *Berman v. Parker*, 348 U.S. 26, 31, 75 S.Ct. 98, 102 (1954); and *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317, 57 S.Ct. 764, 768 (1937). And Congress "power to make an act penal committed within a state of the American Union must have some relation to its delegated powers"; see *United States v. Hall*, 98 U.S. 343, 345–46 (1879); and *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617 (1892).

Perhaps the greatest power of Congress to enact legislation applicable within the jurisdiction of the states is its power to control interstate commerce, and every lawyer and judge is familiar with the case precedence elucidating the breadth of this power. Before 1936, the Supreme Court construed Congressional interstate commerce powers in a very restrictive sense; see *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529 (1918); *Bailey v. Drexel Furniture Company*, 259 U.S. 20, 42 S.Ct. 449 (1922); *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453 (1922); and *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312 (1936). But since the Great Depression, Congress has enacted

legislation to expressly control activity affecting interstate commerce, and the Supreme Court has sanctioned such legislation and held it constitutional; see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348 (1964); and *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377 (1964). But even today, this power is not limitless; see *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624 (1995). Because of the apparently grey parameters of this congressional power which is explained in terms of malleable concepts, it consequently is important to briefly discuss some of the major features of this power.

In *United States v. Steffens*, 100 U.S. 82 (1879), the Supreme Court was required to determine the constitutionality of certain statutes proscribing the fraudulent use of trademarks. Here, Congress had adopted certain legislation regarding trademark registration in 1870, and it supplemented that legislation in 1876 by an act making it penal to fraudulently use a registered trademark. In this case, parties from New York and Ohio who had been indicted for alleged violations of this latter act challenged its constitutionality. The Court in its decision noted that Congress had no constitutional authority regarding trademarks and the protection of trademarks; such being the case, the act in question could have a constitutional foundation only if it was based on Congressional power over interstate commerce. But, the problem regarding the act before the Court arose from the fact that nothing in the act itself mentioned interstate commerce or even attempted to connect this particular law with any regulation of such commerce. Addressing this deficiency, the Court stated:

> "[T]here still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.
>
> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian Tribes. If it is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade; to commerce at all points, especially if it is apparent that it is designed to

govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress," 100 U.S., at 96–97.

Since this trademark law did not confine its operation to interstate commerce, it was held unconstitutional. See also *United States v. DeWitt*, 76 U.S. (9 Wall.) 41 (1870); and *United States v. Fox*, 95 U.S. 670 (1878).

A similar question was presented to the Court in *Illinois Central Railroad Company v. McKendree*, 203 U.S. 514, 27 S.Ct. 153 (1906). Here, Congress adopted an act to suppress cattle diseases, and made the act applicable to cattle shipped in interstate commerce; the act also permitted the Secretary of Agriculture to implement regulations for enforcement of the act. Pursuant to this authority, the Secretary promulgated a regulation which established a quarantine district in the southern portion of the continental United States, and prohibited shipments of cattle from the quarantine district to points outside and north thereof. In this case, the railroad company shipped infected cattle from a part of the State of Tennessee in the quarantine district to a point in Kentucky outside the district; these cattle then infected other cattle, the owner of whom sued for damages. The railroad company's contention that the regulations were unconstitutional prevailed in the Supreme Court, where the Court stated:

"We think the defendant was right in the contention that, if the act of February 2, 1903, was constitutional, and rightfully conferred the power upon the Secretary of Agriculture to make orders and regulations concerning interstate commerce, there was no power conferred upon the Secretary to make regulations concerning intrastate commerce, over which Congress has no control," 203 U.S., at 527.

"The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the state of Tennessee from the south of the line as well as those from outside that state; there is no exception in the order, and in terms it includes all cattle transported from the south of the line, whether within or without the state of Tennessee .... But the order in terms applies alike to interstate and intrastate commerce," 203 U.S., at 528.

It was because the regulation in question was not limited to interstate commerce and

was broader than such and encompassed intrastate commerce that it was found unconstitutional.

In *Howard v. Illinois Central Railroad Company*, 207 U.S. 463, 28 S.Ct. 141 (1908), the Supreme Court found unconstitutional a Congressional act which regulated both intrastate and interstate commerce. Here, Congress adopted legislation ("Employers' Liability Act") which denied the defense of contributory negligence in tort actions by employees against employers who were common carriers in interstate commerce. In this wrongful death action, the railroad challenged the constitutionality of the act, arguing that its scope covered both intrastate and interstate commerce in that it attached liability to interstate carriers regardless of whether the employee involved or the accident was similarly involved in interstate commerce. In holding this act unconstitutional, the Court held:

"The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce," 207 U.S., at 498.

"As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution," 207 U.S., at 499.

The case of *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453 (1922), is very similar to *United States v. Steffens*, supra, in that the act in question was also devoid of an interstate commerce foundation. Here, Congress enacted legislation to tax certain transactions involving futures contracts and to regulate boards of trade, but the act contained nothing in it basing the act on Congressional interstate commerce powers. Members of the Board of Trade of Chicago challenged the constitutionality of this act, arguing that Congress had no innate authority of its own to regulate boards of trade and that the only power of Congress to enact such legislation would be its interstate commerce powers with which this act was totally unconnected. The Supreme Court

agreed and held the act unconstitutional.

The lesson of the above cases is clear. *United States v. Steffens* and *Hill v. Wallace*, supra, stand for the proposition that if Congressional legislation can be valid only under the power of Congress to regulate interstate commerce, the statute itself must express its relationship to interstate commerce; in the absence of such statutory expression, the act is not one based on Congressional interstate commerce powers. The cases of *Illinois Central Railroad Company v. McKendree* and *Howard v. Illinois Central Railroad Company*, supra, demonstrate that certain laws statutorily connected to interstate commerce can be unconstitutional if they are overbroad and encompass both intrastate and interstate commerce.

All will readily admit that Congress can adopt legislation to regulate and control interstate commerce as well as that which "affects" interstate commerce. But, it is equally true that there is a boundary or limit to Congressional power to regulate those activities which "affect interstate commerce." Simply stated, acts "affecting interstate commerce" do not include all human activity, and there is a sizeable amount of human activity which is neither interstate commerce or acts "affecting" interstate commerce; see *United States v. Five Gambling Devices*, 346 U.S. 441, 74 S.Ct. 190 (1953). It is the "de minimis" rule which describes and defines this outer boundary of the power of Congress to regulate activities "affecting interstate commerce." To fall within this rule, an act must have some effect or impact on interstate commerce. Any act which does not affect interstate commerce is outside the scope of this Congressional power.

There exists a line of cases clearly demonstrating just some of the acts which are beyond and outside the "de minimis" rule. In *United States v. Critchley*, 353 F.2d 358 (3rd Cir. 1965), an union official was indicted for a Hobbs Act violation, the facts being based upon the defendant making a complaint against a roofing company for the sole purpose of soliciting a bribe. His conviction was reversed on the grounds

that this act was not one which affected interstate commerce, and there was no other evidence offered to show an interference or obstruction of interstate commerce. In *Houchin v. Thompson*, 438 F.2d 927, 928–29 (6th Cir. 1970), at issue was whether certain workers in a commercial office building were covered by the provisions of the Fair Labor Standards Act. The court found that these workers were not engaged in activities affecting interstate commerce, so they were not covered by the act. Regarding the "de minimis" rule, the Court stated:

"Where some inconsequential incident of interstate commerce happens to result from the general conduct of a fundamentally intrastate business, the rule of de minimis is applicable and the Act does not apply."

In *National Labor Relations Board v. Clark*, 468 F.2d 459, 466 (5th Cir. 1972), an attempt was being made to subject a nursing home in Alabama to federal labor laws. Here, the only nexus of the home to interstate commerce was a $1,700 purchase of supplies from a company whose main office was in Atlanta, Georgia; but, it was not shown how these supplies were shipped to the nursing home. Regarding the "de minimis" rule, the Court held:

"In passing the National Labor Relations Act, Congress intended to provide the Board with the fullest jurisdictional power constitutionally permissible under the Commerce Clause .... If intrastate activity has more than a de minimis effect on interstate commerce, it affects commerce within the meaning of the Act.?

The Court concluded here that there was no evidence showing that the home's activities affected interstate commerce. See also *Austin Road Company v. O.S.H.A.*, 683 F.2d 905 (5th Cir. 1982).

In *United States v. Merolla*, 523 F.2d 51 (2nd Cir. 1975), a conviction under the Hobbs Act was reversed upon a showing that the underlying facts of the case demonstrated no "effect" upon interstate commerce. The defendant in this case had contracted with the victim to build a car showroom for an automobile dealership, but when work on the showroom was jeopardized, the defendant beat the victim and extorted money and property from him. Nonetheless, under the facts of this case, the

Court held that there was not a sufficient jurisdictional nexus in the facts to support a Hobbs Act conviction.

In *United States v. Elders*, 569 F.2d 1020, 1023–24 (7th Cir. 1978), Elders' conviction under the Hobbs Act was reversed also on the basis that the facts involved in the case showed no "de minimis" connection to interstate commerce. In essence, Elders, an employee of a municipality, sought and obtained a series of "kickbacks" or bribes from a tree trimming company engaged in work for the city. In its opinion, the Court summarized the requirements for a federal interstate commerce prosecution as follows:

"In each case, however, a nexus has been required between the extortionate conduct and interstate commerce in order to establish federal jurisdiction. That nexus may be de minimis ... but it must nonetheless exist."

A federal indictment was dismissed in *United States v. Mennuti*, 639 F.2d 107 (2nd Cir. 1981), on the grounds that the defendants' conduct in the case had no "de minimis" effect on interstate commerce; the facts involved the bombing of a residential home. In another attempted bombing case, convictions were reversed on the grounds that the events of which the government complained had no minimal connection to interstate commerce; see *United States v. Monholland*, 607 F.2d 1311 (10th Cir. 1979). And in *United States v. Voss*, 787 F.2d 393 (8th Cir. 1986), it was held that an attempted arson of a home, even though potentially held for commercial activity, involved no "de minimis" connection with interstate commerce; see also *Gramercy 222 Residents Corp. v. Gramercy Realty Assoc.*, 591 F.Supp. 1408 (S.D.N.Y. 1984).

The sum and substance of the above cases is that the maximum, constitutional reach of Congressional interstate commerce powers extends to regulating activities "affecting interstate commerce." The above cases are just a few instances of conduct and acts which do not affect interstate commerce, and are therefore beyond Congressional power. And there are many more countless acts

encountered in everyday life which are obviously beyond the control of Congress under the Commerce Clause; Congressional attempts to control these manifold acts outside this power would be unconstitutional.

Of course, the defense recognizes the abundance of cases where federal criminal laws have been upheld against commerce clause challenges, many of which concern guns and drugs; cases of this nature are cited in abundance in the annotations to Art. 1, §8, cl. 3. A typical example of commerce clause construction is found in *American Life League v. Reno*, 47 F.3d 642 (4th Cir. 1995), which concerned the FACE law designed to deter abortion protesters. However, in *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1629–30 (1995), the Supreme Court took the opportunity to precisely define the breadth of the commerce clause and held as follows:

"Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. [cites omitted] First, Congress may regulate the use of the channels of interstate commerce. [cites omitted] Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. [cites omitted] Finally, Congress "commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. [cites omitted]"

It is the decision in *Lopez* which breathes new life back into commerce clause challenges. Here, the Supreme Court has redefined the maximum reach of the commerce clause to that which "substantially affects interstate commerce." That "ancient" decisional authority of the seventies and early eighties which many had thought was no longer applicable is now very relevant today, including that "old" authority, the "de minimus" rule.

B. The Federal Communications Act.

In an effort to establish an uniform national network of licensing for radio stations, Congress adopted this law in 1934 and made the licensing process applicable only to those stations involved in interstate commerce. Prior to 1982, the

"preamble" portion of 47 U.S.C., §301 simply stated that Congress intended "to maintain control of the United States over all the channels of interstate and foreign radio transmission." Prior to 1982, subsection (a) of §301 limited its intrastate reach to those areas plainly within the territorial jurisdiction of the United States as evidenced by the following language:

"(a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession or District."

But pursuant to P.L. 97–259, 96 Stat. 1091, adopted in 1982, Congress struck the phrase "interstate and foreign commerce" from the "preamble" portion in the first sentence of this section and changed subsection (a) to read as follows:

"(a) from one place in any State, Territory or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District."

Clearly, the claim to control the airwaves of this entire country, both intrastate and interstate, is only a recent legislative invention arising from the 1982 act.

It is remarkable that there has been precious little litigation, civil or criminal, regarding the scope of this law. There are very few reported criminal prosecutions under the pre–1982 version of this law, and the most notable are *United States v. Betteridge*, 43 F.Supp. 53 (N.D.Ohio 1942), which involved a radio transmission receivable on Lake Erie, and *United States v. Brown*, 661 F.2d 855 (10th Cir. 1981), which involved a radio transmitter powerful enough to cross state lines. It must be remembered that these two cases were prosecutions under a law which clearly was tied to the constitutional limits of Congressional interstate commerce powers and they thus have no relevance to the issue which Joe Ptak, Jeffrey "Zeal " Stefanoff and the Hays County Guardian et.al, raises.

The simple fact of the matter is that §301(a) is unconstitutional under the *Lopez* rationale. The maximum breadth of this power extends only to that which substantially affects interstate commerce (this might require re–examination of some

of the cases discussing the "de minimus" rule). The full breadth of the interstate commerce power is already encompassed within §301(d), which requires those radio stations having an effect beyond the borders of the state where it is located to be licensed. Because §301(d) already reaches the maximum extent of this federal power, the 1982 amendment to §301 can only be construed to apply to purely intrastate commerce in its classical sense. This, of course, is unconstitutional.

The only other manner by which Congress can exert any type of control over intrastate commerce is if it makes a legislative finding that all intrastate commerce in the activity to be regulated affects interstate commerce. However in reference to the 1982 expansion of the relevant provisions of §301, no such finding was made. In fact, the 1982 amendment was adopted for the sole purpose of assisting criminal prosecutions under the Communications Act:

"The present statutory ambiguity imposes wasteful burdens on the Commission and various United States Attorneys, particularly with regard to prosecution of Citizen Band (CB) radio operators transmitting in violation of FCC rules. Typically in such a case, the defendants concede the violation, but challenge the Federal Government's jurisdiction on the ground that the CB transmission did not cross state lines. To refute this argument, the Commission invariably is asked to furnish engineering data and experts witnesses, often at considerable expense. In most instances, once the expert evidence is made available, the defendants plead guilty and the case terminated.

The provision would end these wasteful proceedings. Further, it would make Section 301 consistent with judicial decisions holding that all radio signals are interstate by their very nature. See, e.g., Fisher?s Blend Station Inc. v. Tax Commission of Washington State, 197 U.S. 650, 655 (1936)."

See 1982 U.S.C.A.N.S. 2275–76. Thus the reason for expanding §301 to encompass purely intratstate commerce was not based upon the requisite Congressional finding but was instead done to achieve an ulterior purpose of assisting criminal prosecutions and making them easier. And the reason why such prosecutions needed to be made easier arose from cases where the defense insisted upon proof that the prosecution was really one which fell within the scope of federal laws. Consequently, because there has been no congressional finding regarding the impact of intratstate activities

upon interstate commerce, §301(a) cannot be justified as constitutional.

CONCLUSION

For the foregoing reasons, this prosecution must be dismissed because §301(a) is plainly and without a doubt unconstitutional.

Respectfully submitted this the 10 day of May, 1998.

Joe Ptak, Jeffrey "Zeal" Stefanoff and
the Hays County Guardian et.al,

P.O. Box 305

San Marcos, Texas 78667

CERTIFICATE OF SERVICE

We hereby certify that we have this date served a copy of the foregoing motion upon the below named Hearing Examiner and counsel for the Federal Communication Commission by depositing the same in the United States mail, postage prepaid, in envelopes addressed to them at their correct mailing addresses:

Federal Communication Commission
att: Judge Richard Sipple Hearing Examiner
1919 M. ST. N.W.
Washington, D.C. 20554

Federal Communication Commission
att: Norman Goldstein,Chief Council
1919 M. St.N.W.
Washington, D.C. 20554

Dated this the 10 day of May, 1998.

Joe Ptak, Jeffrey "Zeal" Stefanoff and the
Hays County Guardian et.al,
P.O. Box 305
San Marcos, Texas 78667